

463-XX-NEW WATER RIGHTS

(1) Introduction

This rule describes the water rights required for energy facility siting. It is accepted that water is a finite and valuable natural resource necessary for the health and welfare of all citizens. It shall be EFSEC's policy to promote the use of the state's water resources in a manner that maximizes the net benefits to the natural environment. Consistent with this understanding, applicants shall consider alternatives to consumptive water use including air cooling and reclaimed or reuse water or other alternatives. In an application for site certification the applicant shall provide detailed information comparing the water use scenarios, their costs and overall water consumption rates that were considered during the preparation of the application for site certification. The application shall describe the water conservation methods that will be used during the construction and operation of their proposed energy facilities and how those measures will be implemented. In addition, the applicant is encouraged to look at opportunities to mitigate or otherwise offset the effects of water consumption at the facility.

(2) Purpose

The purpose of this rule is to set forth how applicants proposing to use water resources for an energy facility may request and receive authorization for such intended use.

(3) Procedures for water use authorization

(a) Submission of Water Rights - Applicants proposing to use water for an energy facility must do one of the following:

- (i) submit water rights or other water use authorizations suitable for use by the proposed energy facility without change,

- (ii) submit water rights which are approvable to be changed to meet the points of withdrawal, place of use and purpose of use identified in the application, or
- (iii) submit water rights from both categories sufficient to meet the needs of the proposed facility.

Submitted water rights or other authorizations to use water must be specifically identified in the application. In no event will EFSEC authorize the use of a larger quantity of water than authorized by the water rights or water use authorizations submitted by the applicant and identified in the application.

- (b) Beneficial Use Requirement - Water rights submitted by the applicant and identified in the application shall have been beneficially used and not subject to relinquishment for nonuse.
- (c) Water Use Authorizations - The term “water use authorization,” as used herein, is any right to use water for a proposed energy facility that is not based directly upon a water right permit or certificate issued by the State. It is anticipated that such an authorization will usually consist of a contractual right to use water supplied by a municipal corporation or other water purveyor, but it may consist of any lawful right to use water for an energy facility.
- (d) Water Rights Suitable for Use Without Change - In its site certification application, an applicant may identify water rights or water use authorizations sufficient to meet the requirements of the proposed energy facility that do not require any change to a water right permit or certificate issued by the State. In such event, EFSEC shall determine whether the applicant holds, or will hold, sufficient legal authority to water in a quantity sufficient to meet the requirements of the proposed energy facility.

(e) Water Rights That Require Changes –

- (i) If the applicant submits water rights that require changes to:
 - (A) the points of withdrawal and/or diversion;
 - (B) the place of use; and/or
 - (C) the purpose and time of use, in order to make the water rights suitable for use by the proposed energy facility, then EFSEC shall determine whether to authorize water use incorporating the requested changes.
- (ii) EFSEC's determination shall be based on the substantive law applicable to a water rights change application, including but not limited to RCW 43.21A, 90.03, 90.14, 90.44 and 90.54 or their successors, together with implementing regulations and judicial decisions, but not including requirements for priority processing of applications.
- (iii) As part of its application, the applicant must provide EFSEC with a report of examination, identifying the water rights changes to be made, the quantities of water (both in gallons per minute and acre feet per year) that are eligible to be changed, together with any limitations on the use, including time of year. The report of examination shall also include comments by the Department of Fish and Wildlife with respect to the proposed changes, and consistent with subsection 1 above.
- (iv) Ordinarily, the report of examination shall be prepared by the Department of Ecology and submitted to EFSEC. The applicant shall pay the Department of Ecology to prepare the report.

- (v) At least six months prior to submitting an application, the applicant shall notify the Department of Ecology of its intent to submit an application and the water rights changes that will be necessary.
- (vi) Within twenty one calendar days, the Department of Ecology shall notify the applicant in writing whether it will be able to complete a report of examination for inclusion in the application. If the Department of Ecology agrees to prepare the report of examination the applicant and the Department of Ecology shall work together to develop a schedule and exchange information needed to complete the report of examination. The Department of Ecology's preparation of a report of examination shall not make it a sponsor of the proposal or preclude it from taking a position with regard to the proposed energy facility.
- (vii) If the Department of Ecology notifies the applicant that it is unable to prepare a report of examination for submittal with the application, or the Department does not notify the applicant within twenty one calendar days as described in this subsection, the applicant may retain a consultant to prepare the report. If a consultant prepares the report of examination, the Department of Ecology may provide EFSEC with any comments related to any requested changes.
- (viii) If EFSEC authorizes the applicant's requested water use in the site certification agreement, it may specify the additional terms and conditions of water use in the event that water usage in the amounts and at such times as proposed by the applicant will cause an adverse impact on other water users, established low flow limits, critical fisheries habitat or the environment.

- (ix) EFSEC will not change the water rights submitted by the applicant. Rather, those water rights will be identified in the site certification agreement and form the basis for the water use authorized by EFSEC. No other use shall be made of those water rights during the life of the site certification agreement.
- (f) Options for Applicant - Nothing in this section shall prevent an applicant from seeking to obtain new water rights from the Department Ecology, or from applying to the Department of Ecology or a Water Conservancy Board to change a water right, but any such application shall be separate and distinct from an application for site certification.